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18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA

20 STEPHANIE ENYART

21 Case NO. C09-05191

22 Plaintiff,

23 v.
24 PLAINTIFF'S NOTICE OF MOTION AND
25 MOTION FOR A SECOND
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

NATIONAL CONFERENCE OF BAR
EXAMINERS, INC.,

Date: June 4, 2010

26 Defendant.

27 Time: 10:00 a.m.
Courtroom: 8

1 **NOTICE OF MOTION AND MOTION FOR A SECOND PRELIMINARY INJUNCTION**

2 TO THE NATIONAL CONFERENCE OF BAR EXAMINERS AND THEIR
3 ATTORNEYS OF RECORD:

4 Please take notice that on June 4, 2010 at 10:00 A.M., or as soon thereafter as
5 counsel may be heard, before Judge Charles R. Breyer, United States District Court,
6 Northern District of California, 450 Golden Gate Avenue, San Francisco, California,
7 Courtroom 8, Plaintiff Stephanie Enyart ("Plaintiff") will move the Court under Federal
8 Rule of Civil Procedure 65 and Civil Local Rules 65-2 and 7-2 for a mandatory
9 preliminary injunction requiring Defendant National Conference of Bar Examiners
10 ("NCBE") to provide specific requested accommodations to Plaintiff Stephanie Enyart on
11 the August 2010 administration of the Multistate Professional Responsibility Exam
12 ("MPRE") and on any other administration to Ms. Enyart of the California Bar Exam, the
13 Multistate Bar Exam ("MBE") and/or the MPRE. This motion is brought on the grounds
14 that Defendant, by denying Plaintiff her requested accommodations on these
15 examinations, is in violation of the Americans with Disabilities Act ("ADA") (42 U.S.C. §§
16 12181, *et seq.*), and of the Unruh Civil Rights Act (California Civil Code §§ 51, *et seq.*),
17 and on the basis that these violations have caused and are causing Plaintiff irreparable
18 injuries. This motion is based on this Notice of Motion and Motion, the supporting
19 Memorandum of Points and Authorities and declarations filed herewith, and on such
20 further written and oral argument as may be presented at or before the time the Court
21 takes this motion under submission.

22 The relief that Plaintiff seeks from the Court is a preliminary injunction requiring
23 NCBE to provide, and to instruct ACT, Inc. and the State Bar of California to provide,
24 accommodations to Ms. Enyart with respect to the administration of the MPRE
25 scheduled for August 6, 2010, as well as on any future administrations that Ms. Enyart
26 may need to take of the MPRE and/or the California Bar Exam, including the MBE. At
27

1 issue is Plaintiff's request for the accommodation on the MPRE and MBE of taking
2 these examinations on a computer using two software programs: JAWS screen reading
3 software and ZoomText screen magnification software, with the text of the exam
4 questions presented in Arial 14-point font. Plaintiff also seeks the accommodation of
5 being permitted to set up the necessary computer equipment at the secure test location
6 the day before the exam in order to ensure that all hardware and software is functioning
7 properly. Plaintiff requests that the Court enjoin NCBE to provide, and to instruct ACT,
8 Inc. and the State Bar of California to provide, the requested accommodations at issue
9 on the August 2010 administration of the MPRE and any other administration to Ms.
10 Enyart of the MPRE and MBE. Plaintiff requests that the injunction specify that the
11 accommodations at issue be provided in addition to the other accommodations
12 previously granted plaintiff by ACT and the State Bar of California for past
13 administrations of the MPRE and MBE, respectively. Plaintiff is also willing to post a
14 further bond of \$2,500 to cover the expenses associated with providing these
15 accommodations on the August 2010 MPRE in the event that NCBE prevails at trial, in
16 addition to the \$5,000 bond she already posted under the terms of the injunction that
17 ordered NCBE to allow her to use JAWS and ZoomText on the February and March
18 administrations of the subject exams.

21
22 Dated: April 30, 2010

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23 By: /s/ Laurence Paradis
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **SUMMARY OF ARGUMENT**

3 Stephanie Enyart, a blind law school graduate, previously petitioned this Court
4 for an injunction requiring the National Conference of Bar Examiners ("NCBE") to grant
5 her the accommodation of using a computer equipped with two software applications,
6 JAWS and ZoomText, to take two licensing exams controlled by NCBE that are typically
7 given in print form. The Court issued such an injunction on February 4, 2010 after
8 holding a hearing on January 29, 2010. NCBE petitioned the U.S. Court of Appeals for
9 the Ninth Circuit for an emergency stay of the February 4 injunction, but the stay was
10 denied on February 23.

11 Ms. Enyart took the February 2010 California Bar Examination, including the
12 Multistate Bar Exam ("MBE"), as well as the March 2010 Multistate Professional
13 Responsibility Examination ("MPRE") with these software programs. She took both of
14 these exams on laptop computers provided by NCBE, and she encountered problems
15 configuring NCBE's laptops to work with her own large monitors, which she brought to
16 both exams under arrangements previously made with the State Bar of California and
17 ACT. Ms. Enyart also discovered that NCBE had installed security measures on its
18 laptops that prevented her from displaying the test questions in the style and size of font
19 that she is accustomed to using. The problems with configuring NCBE's equipment to
20 work with Ms. Enyart's monitor delayed the start time for the MBE, causing those two
21 test days to last longer than the allotted six hours. Ms. Enyart was also unable to read
22 the questions on either exam in the font size that she has used throughout law school
23 and in work settings, slowing down her reading time and resulting in increased eye
24 fatigue.

25 On April 5, 2010, Ms. Enyart learned that her score on the March 2010 MPRE
26 was not high enough to qualify her for admission to the California Bar. She will
27 accordingly need to take the next administration of the MPRE, which is scheduled for
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1 August 6 of 2010. Plaintiff's counsel has asked counsel for NCBE whether NCBE would
2 be willing to let Ms. Enyart use JAWS and ZoomText on the August administration of
3 the MPRE absent a court order and were informed that NCBE would not do so.
4 Therefore, Ms. Enyart seeks a preliminary injunction similar to that granted on February
5 4, 2010 that would afford her the same accommodations covered by that injunction,
6 thus allowing her to take the next administration of the MPRE in a manner that will not
7 disadvantage her because of her disability. Ms. Enyart also seeks two slight
8 modifications to the February 4 injunction that would address the problems with the font
9 settings and with configuring the computer equipment, problems of which Ms. Enyart
10 was not aware when she first moved for a preliminary injunction on December 24, 2009.
11 Neither of these two modifications to the injunction language would impose any
12 additional cost or burden on NCBE, and so their inclusion does not alter the balance of
13 equities favoring the issuance of an injunction. Nothing else about the factual
14 circumstances or the legal analysis in this case has changed since the Court issued its
15 order awarding preliminary injunctive relief on February 4, 2010. Plaintiff thus
16 respectfully requests that the Court issue an injunction to cover the provision of JAWS
17 and ZoomText on the August 2010 administration of the MPRE and to specify that the
18 test questions be provided in Arial, 14-point font and that Ms. Enyart be permitted to
19 connect her monitor and other peripheral devices to NCBE's laptop the day before the
20 exam.

21 **I. STATEMENT OF FACTS**

22 The facts regarding Ms. Enyart's need to use JAWS and ZoomText are identical
23 to those cited in the Memorandum of Points and Authorities supporting Ms. Enyart's
24 Motion for Preliminary Injunction filed on December 24, 2009. Specifically, Ms. Enyart's
25 treating ophthalmologist, rehabilitation counselor, law school dean and adaptive
26 technology specialist have all stated under oath that Ms. Enyart needs JAWS and

1 ZoomText to access complex written material like that contained on the MPRE.¹ Two
 2 experts retained by NCBE commented on Ms. Enyart's accommodation requests,
 3 though neither ever examined her; one admitted that he was not knowledgeable about
 4 the accommodations at issue, while the other agreed that Ms. Enyart needed the
 5 simultaneous auditory and visual input that JAWS and ZoomText provide.² None of the
 6 alternative accommodations offered by NCBE for past administrations of the MPRE, like
 7 use of a human reader or closed circuit television ("CCTV"), would allow Ms. Enyart to
 8 fully comprehend the language of the test questions, and many of the proffered
 9 accommodations would also expose her to significant side effects such as eye fatigue
 10 and nausea.³ As the Court explained in its February 4 order granting Plaintiff's first
 11 request for a preliminary injunction, "[b]ecause the accommodations provided by NCBE
 12 will not permit Enyart to take the exam without severe discomfort and disadvantage, she
 13 has demonstrated the test is not 'accessible' to her" without the accommodations of
 14 JAWS and ZoomText.⁴ Nothing about the medical evidence has changed in the
 15 intervening two and a half months. Yet when Plaintiff's counsel recently asked counsel
 16 for NCBE if NCBE would permit Ms. Enyart to use JAWS and ZoomText on a future
 17 administration of the MPRE absent a court order, NCBE responded that it would not do
 18 so.⁵

19 The only new facts that have emerged since the Court entered its order granting
 20 Plaintiff's first request for preliminary injunctive relief in this case are that Plaintiff took
 21 the two exams covered by that injunction with the ordered accommodations and that
 22 she received the results of one of those examinations, the MPRE. Ms. Enyart's score

23 ¹ See Plaintiff's Memorandum of Points and Authorities in Support of Motion for
 24 Preliminary Injunction filed December 24, 2009 ("Mot.") at 5.

25 ² Mot. at 6-7.

26 ³ *Id.* at 7.

27 ⁴ Order Granting Plaintiff's Motion for Preliminary Injunction filed February 4, 2010
 28 ("Order") at 5.

⁵ Declaration of Daniel F. Goldstein in Support of Plaintiff's Motion for Preliminary
 Injunction ("Goldstein Decl."), ¶ 9.

1 on the March 2010 MPRE was not high enough to meet the eligibility requirements for
 2 obtaining a license to practice law in California, and she will thus have to retake the
 3 MPRE and achieve a higher score in order to be admitted to the California Bar.⁶ The
 4 results of the February 2010 California Bar exam, including the MBE, are scheduled to
 5 be released on May 14. Plaintiff will supplement the record before this Court with
 6 information about her performance on the Bar exam once those results become
 7 available. However, because she will need to take the MPRE again regardless of
 8 whether she achieved a passing score on the February 2010 California Bar exam, and
 9 because NCBE has indicated that it will not permit her to use JAWS and ZoomText on
 10 the MPRE when it is next offered in August of 2010 without an applicable court order,
 11 Ms. Enyart must return to this Court for relief in order to take this vital licensing exam in
 12 a manner that properly accommodates her disability.

13 As she has previously explained, Ms. Enyart has used computers equipped with
 14 JAWS and ZoomText in academic and professional settings, including to take exams,
 15 for many years.⁷ But before taking the MBE on NCBE's laptop in February of this year,
 16 Ms. Enyart had never taken an exam on a computer that was not her own.⁸ She was
 17 accordingly surprised when she arrived for her first day of the MBE (which she took over
 18 two days in accordance with accommodations previously granted to her by the State
 19 Bar of California) only to find that NCBE had turned off many common functions in
 20 Microsoft Word on the laptop containing the test questions.⁹ Because of these disabled
 21 features, Ms. Enyart could not change the font of the test questions to Arial 14-point, the
 22 size and style of font that she uses when she reads text on a computer screen, but was
 23 forced to retain the default settings installed by NCBE, which displayed the test

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 25 ⁶ Goldstein decl. ¶ 8.
 26 ⁷ Mot. pp. 2-3.

27 ⁸ Declaration of Stephanie Enyart in Support of Motion for Second Preliminary Injunction
 filed April 30, 2010 ("Enyart Decl."), ¶ 19.

28 ⁹ Enyart decl. ¶¶ 2, 8.

1 questions in a smaller point size in times New Roman font.¹⁰ Ms. Enyart uses Ariel 14-
2 point font instead of Times New Roman because the Ariel 14-point letters are larger and
3 their lines are thicker and more sharply defined, making them easier for her to read.¹¹
4 Yet neither Ms. Enyart nor the test administrators who were present during the MBE
5 were able to alter NCBE's default font settings because of the security measures NCBE
6 had installed on its laptop.¹² As a result Ms. Enyart was forced to read all 200 questions
7 on the MBE in a smaller, less bold font than the one she typically uses, slowing down
8 her reading speed, exacerbating her eye fatigue and leaving her exhausted by the end
9 of the second day of testing.¹³ Ms. Enyart found the font used by NCBE so debilitating
10 that she took time away from answering questions to continue (ultimately without
11 success) attempting to adjust the font, even though she was unable to answer all of the
12 questions and had to enter guesses for eight questions that she did not have time to
13 read.¹⁴

14 Although the inability to adjust the font of the test questions was the most
15 significant problem Ms. Enyart experienced in terms of its impact on her testing
16 conditions, it was not the only problem that she encountered when taking the MBE on
17 NCBE's laptop. She also had difficulty configuring the laptop to work properly with her
18 large monitor, which she had used without incident in conjunction with her own laptop
19 on all other sections of the California Bar Exam.¹⁵ When either of two available
20 monitors was first plugged into the NCBE laptop, a large black strip appeared across
21 the top and bottom of the monitor, obscuring large portions of the screen.¹⁶ Although
22 this monitor problem, unlike the font problem, was ultimately resolved, the start time for
23 Ms. Enyart's first day of MBE testing was delayed for over two and a half hours while

24 _____
25 ¹⁰ Enyart Decl. ¶ 7.
26 ¹¹ *Id.*

¹² Enyart Decl. ¶¶ 10, 13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Enyart Decl. ¶ 3.

1 she and the test administrators attempted various fixes.¹⁷ Ms. Enyart consequently did
 2 not complete the first day of MBE testing until 6 PM after arriving in her testing room at
 3 8:30 that morning.¹⁸

4 With only one week between the MBE and the March 2010 administration of the
 5 MPRE, Ms. Enyart's attorneys promptly attempted to resolve these technical issues with
 6 NCBE's attorneys in hopes of forestalling similar problems from interfering with Ms.
 7 Enyart's ability to take the MPRE.¹⁹ To prevent the delay that could occur if
 8 compatibility problems between NCBE's laptop and Ms. Enyart's peripheral equipment
 9 were not discovered until test day, her counsel asked if she could set up and test those
 10 peripheral devices with the laptop the day before the exam, with an ACT employee
 11 present to ensure that Ms. Enyart did not access any test questions.²⁰ Her attorneys
 12 also asked if the default font for the file containing the test questions could be changed
 13 to Ariel 14-point, without requiring NCBE to remove any of the security features it had
 14 put in place on its laptop.²¹

15 Counsel for NCBE suggested that any arrangement to set up computer
 16 equipment and trouble-shoot any compatibility problems the day before the exam would
 17 need to be made directly with ACT.²² Ms. Enyart's counsel reached such an
 18 arrangement with ACT personnel, and Ms. Enyart connected her monitor, keyboard and
 19 trackball mouse to the NCBE laptop the day before the March MPRE, resolved the one
 20 compatibility problem that arose with a five-minute call to a technical support consultant,
 21 returned the NCBE laptop to the ACT employee for safekeeping while leaving her own
 22 computer equipment in the locked test room overnight, and was able to begin the MPRE

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 24¹⁶ Enyart Decl. ¶ 5, 11.
 25¹⁷ Enyart Decl. ¶¶ 4-6.
 26¹⁸ Enyart Decl. ¶¶ 2, 9.
 27¹⁹ Goldstein Decl. ¶ 4.
 28²⁰ *Id.*
²¹ *Id.*
²² Goldstein Decl. ¶ 5.

1 with no delay.²³ However, counsel for NCBE stated that it was too late to adjust the font
 2 settings because the laptop had already been shipped to ACT by the time Plaintiff's
 3 counsel brought the matter to NCBE's attention.²⁴ Thus Ms. Enyart was again forced to
 4 read the entire exam, this time consisting of sixty questions, in the smaller Times New
 5 Roman font, leading to fatigue and eye strain.²⁵

6 II. ARGUMENT

7 A. Plaintiff Meets the Standards for a Preliminary Injunction.

8 The ADA authorizes injunctive relief to remedy acts of discrimination against
 9 persons with disabilities.²⁶ To obtain a preliminary injunction, plaintiff must demonstrate
 10 that she is likely to succeed on the merits and suffer irreparable harm in the absence of
 11 preliminary relief, the balance of equities tips in her favor and a preliminary injunction is
 12 in the public interest.²⁷ Plaintiff previously made the requisite showing on all four of
 13 these factors when she requested and was granted a preliminary injunction requiring
 14 the same core accommodation that she is requesting here, the ability to use JAWS and
 15 ZoomText, on the February MBE and March MPRE.²⁸ The two additional
 16 accommodations being sought for the first time through this motion are minor
 17 modifications the need for which only came to Plaintiff's attention after she tried to take
 18 these exams on laptops provided by NCBE and that are necessary in order to give her
 19 access to the test material in a manner that will not disadvantage her while addressing
 20 NCBE's security concerns by allowing NCBE to use its own laptops. Neither of these
 21 modifications alters in any way the analysis that the Court has already conducted of the
 22 factors relevant to issuance of a preliminary injunction in this case. Accordingly, for all
 23 the reasons in the Court's February 4, 2010 order as well as the reasons set out in

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 25²³ Enyart Decl. ¶¶ 15-17.
 26 Goldstein Decl. ¶ 5.

²⁵ Enyart Decl. ¶ 17; Goldstein Decl. ¶ 7.

²⁶ See 42 U.S.C. §12188(a)(1).

²⁷ *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009).

²⁸ Order at 2.

Plaintiff's Memorandum of Points and Authorities in Support of Her Motion for Preliminary Injunction filed on December 24, 2009, Plaintiff meets all of the requirements for the awarding of preliminary injunctive relief.

B. Bond Should Be Set at \$2,500.

The order granting Plaintiff's previous motion for a preliminary injunction required her to post a bond in the amount of \$5,000, which would be awarded to NCBE in the event it prevails at trial.²⁹ That order covered two exams, the February 2010 MBE and the March 2010 MPRE. As Ms. Enyart is currently seeking preliminary injunctive relief with respect to only one exam, the August 2010 MPRE, a further bond of \$2,500 should be sufficient to protect NCBE's interests.

III. CONCLUSION

For the foregoing reasons, Ms. Enyart respectfully requests that the Court grant her Motion for Preliminary Injunction, which compels NCBE to provide Ms. Enyart's requested accommodations, including the use of JAWS and ZoomText, the use of Arial 14-point font for test questions, and the ability of Ms. Enyart to set up her monitor, keyboard and trackball mouse with NCBE's laptop the day before the exam, during the August 2010 MPRE and any future administrations that Ms. Enyart may need to take of the MBE or MPRE.

Respectfully Submitted,

Dated: April 30, 2010

DISABILITY RIGHTS ADVOCATES

By: /s/ Laurence Paradis

LABARRE LAW OFFICES, P.C.
By: /s/ Scott Labarre

BROWN, GOLDSTEIN & LEVY, LLP
By: /s/ Daniel F. Goldstein

Attorneys for Plaintiff

²⁹ Order at 12.